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Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

October Term, 1985

LAWRENCE J. GALARDI and SHARI J. GALARDI,

Petitioners,

v.

TOKAI BANK OF CALIFORNIA, a California corporation, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Ninth Circuit erroneously construe the denial of:

A. A jury trial; and

B. A *review* by the District Court,

when it held the issue on appeal below was "first that the exercise of jurisdiction by the Bankruptcy Court was unconstitutional under *Northern Pipeline*. . . ." (Opinion, Appendix A, this Petition.)

2. Were Petitioners deprived of their constitutional right to adjudication of their substantive rights by an Article III Court:

A. When they were denied a jury trial; and

B. When the District Court failed to conduct a review in accordance with the mandate of the Emergency Rule.

3. Did the District Court have the power to appoint a Retired Referee to sit as a Bankruptcy Judge under *Marathon,* under the Emergency Rule, or, any other rule of law.

4. Should the Supreme Court grant certiorari.

PARTIES

Petitioners submit the following list of all persons which have an interest in the outcome of the case before this Court.

Lawrence J. Galardi	Petitioner
Shari J. Galardi	Petitioner
Tokai Bank of California	Respondent
David A. Gill	Respondent

DATED: February 13, 1986

LAWRENCE J. GALARDI
Attorney for Petitioners

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PETITION FOR WRIT OF CERTIORARI

STATEMENT

This matter was tried in the United States Bankruptcy Court for the Central District of California. It was tried to the Court without a jury. The Honorable Russell Seymour presided. All defendants were represented throughout the trial by counsel for Tokai Bank.

The Bankruptcy Court made findings of fact, conclusions of law, and a proposed judgment, and

referred the matter to the District Court on September 15, 1983. On September 16, 1983 the District Court, (Judge Manuel Real), entered a judgment dismissing the action.

Petitioners appealed. The Ninth Circuit in its memorandum decision filed December 17, 1985, affirmed.[1]

A. Preliminary

Petitioners had filed a voluntary Chapter 11 reorganization on January 20, 1981. Tokai Bank was a secured creditor. Gill was appointed Trustee and the proceeding was converted to a Chapter 7 liquidation.

An adversary proceeding in the Bankruptcy Court was filed on March 23, 1983. The Bankruptcy Court had earlier found "that the relief being sought in the Debtor's Application should be requested in the context of an adversary proceeding to be governed by the rules applicable to adversary proceeding." The Court ordered "the pending application is hereby dismissed . . . and if the debtors intend to proceed . . . they *shall* proceed by filing a proceeding under the Adversary Rules on or before March 23, 1983 . . . in accordance with Bankruptcy rule 704." (emphasis added)[2]

B. Factual Summary. The Circumstances Prior To Suit.

The property of the Estate was auctioned on December 12, 1982 after the Bankruptcy Court entered its order dated November 24, 1982.[3] Prior to the November 24,

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[1]Appendix A, this Petition.

[2]Order dated March 18, 1983, Appendix B, this Petition.

[3]The property (assets) consisted of a residential estate in Malibu on 8 acres, owned by Lawrence J. Galardi, MAI appraised at $3.5 million (hereinafter, "Eagle Pass"); and, 29 acres overlooking the

1982 Order, an adversary proceeding initiated by the defendant Trustee seeking leave to sell free and clear was restored to the calendar. It was heard on November 9, 1982 and summarily resulted in an Order dated December 7, 1982, authorizing sale free and clear. That Order relied upon a stipulation of Tokai and the Trustee permitting Tokai to submit its beneficiary demand in full, and requiring immediate payment.[4] The Court also relied upon the stipulation of the Trustee and Cambridge, another secured creditor, for the full amount of its claim. That Stipulation was so ordered on November 12, 1982.

A confidential letter agreement dated October 8, 1982 between Tokai Bank and the defendant Trustee, set forth their agreement to make joint application to employ an auctioneer; establish a minimum credit bid for the 29 acres; establish financing terms for the 29 acres; allow the fully secured claim of Tokai; and, establish a formula for credits based on a financed sale of the 29 acres. That Application was heard and fully allowed over objections for lack of notice to debtors and to general creditors, as to the confidential agreement.[5] The Court ordered the 29 acres be sold prior to the Eagle Pass property. However, the 29 acres was secondary security, only.

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ocean in Malibu, owned by Lawrence J. Galardi and Shari J. Galardi, MAI appraised at over $2.7 million, (hereinafter, "the 29 acres"). Liabilities in the reorganization were approximately $1.9 million.

[4]During the trial Petitioners sought to, among other matters, compel disclosure by Tokai of interest it claimed. The Court ordered disclosure and later reversed itself and agreed with counsel for the Bank that disclosure was not required.

[5]The Confidential Letter Agreement was not disclosed until the hearing on November 15, and only after the Court ordered it be disclosed.

The auction was conducted on December 12, 1982. A transcript of the auction proceeding was introduced at trial. At the auction, there was confusion. The auctioneer refused to respond to questions; there was confusion as to the terms of the prospective sales because of inconsistencies between the advertising and the auctioneers and the Trustee's representations. Bidding was chilled and prevented.

After the December 12, 1982 auction, the Trustee transferred title to the 29 acres to Tokai Bank and thereafter, Tokai by Grant Deed transferred title to a "customer of the Bank". The estate received a credit of only $641,000, as a result of Tokai's taking the property.

Reasons For Granting Certiorari

ARGUMENT

1. Petitioners respectfully submit the decision below must be reversed because:

A. Petitioners were deprived of their constitutional right to adjudication by an Article III Court;

B. The Bankruptcy Court was improperly constituted; and,

C. The Bankruptcy Court denied Petitioners the right to a jury trial ordering the Petitioners to file an adversary proceeding.

2. The Bankruptcy Court relied upon the Emergency Rule when the Court ordered Petitioners file an adversary proceeding, when it made its referral to the District Court and when the judgment appealed from below was signed by Judge Real without review as required by the Rule.

3. The Emergency Rule provided a mechanism for avoiding exercise of Article III powers by judicial bodies without tenure, but, that feature of its constitutionality had nothing to do with the power of the District Court to either seat a Bankruptcy Judge outside the provisions of the transition statutes; rubber-stamp a non-core matter as the District Court did here; or, lend the weight and authority of its judicial power to the unconstitutional exercise in the Bankruptcy Court that resulted in depriving Petitioners of a trial by jury.

4. While the Emergency Rule may have been a constitutional exercise within the context of the need to maintain a functioning bankruptcy system after *Marathon*,[6] the conduct of the Bankruptcy Court in this proceeding occasioned error, as a matter of law. Likewise, the conduct of the District Court, in failing to conduct a review. The conduct of both courts deprived Petitioners of their basic constitutional rights to a jury trial by an Article III Court. That excess was compounded when the District Court merely endorsed the result reached after ten full trial days, signing the judgment appealed from the day after it was submitted for a mandatory full and complete review under the Emergency Rule.

Accordingly, the judgment should have been reversed by the Ninth Circuit, and the matter remanded for trial on the issue of damages, only.

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[6]The Ninth Circuit erroneously stated and decided a *non-issue*, namely the constitutionality of the bankruptcy court after *Marathon*.

POINT I

THE BANKRUPTCY COURT IS NOT AN ARTICLE III COURT AND, ABSENT VIGILANT SUPERVISION JUDICIAL CONTROL AND ACTUAL JUDICIAL REVIEW IT IS NOT AN ADJUNCT TO THE DISTRICT COURT. PETITIONERS DID NOT CONSENT TO THE INVOCATION OF THE COURT'S JURISDICTION BY ITS ORDER DIRECTING AN ADVERSARY PROCEEDING BE FILED.

In *Pacemaker v. Instromedix etc.*, 725 F.2d 537 (1984), The Magistrates' Act and specifically 28 U.S.C. §636(c), was exhaustively examined against the background of special designation by the United States District Court (28 U.S.C. §636(c)(1)) and procedures established to prevent Magistrates from coercing litigant consent (28 U.S.C. §636(c)(2)).

The Supreme Court's decision in *Marathon* was earlier addressed by the Ninth Circuit Panel in August 1983, as follows:

> "A plurality of the Supreme Court plus two concurring justices held the Bankruptcy Court system to be unconstitutional. The plurality reasoned that bankruptcy judges were not Article III Judges, that the Bankruptcy Courts were not constituted as Article I Courts, and that the Bankruptcy Courts could not properly be considered "adjuncts" to the District Court. The plurality also held that the invalidity of the Bankruptcy Courts would only be applied prospectively."[7] *Pacemaker Diagnostice Clinic*

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[7]Prospective relief would be entirely appropriate here, as hereinafter appears.

of America, Inc., v. Instromedix, Inc., 712 F.2d 1305 (9th Cir. 1983), at P. 1308.

In the within action while the Bankruptcy Court referred its decision to the District Court for review pursuant to ¶(d)(3)(A) and (B), no review of the contested issues was made and in view of the language of the judgment none was contemplated.

The Ninth Circuit cites *Campbell v. United States District Court*, 501 F.2d 196, 206, *cert. denied*, 419 U.S. 879 (1974) in holding that objections to the findings and conclusions of the bankruptcy court were a prerequisite to review by the district judge. *Campbell, supra,* in fact held Local Rule 505 (4) provides for a "review of a magistrate's decision by the Judge" upon a notice to the magistrate and the adverse party. In the case at hand *review is mandated.* No notice is required to afford entitlement to review and no objections are required. *Campbell, supra,* is thus not only distinguishable, it is, Petitioners respectfully submit, utterly without applicability, here. In any case, the Referral stated the objections of Petitioners.

At the outset, there were issues of Article III power, Article I power, adjunct courts, Special Master powers and Reference powers, to be decided. In its Referral the Bankruptcy Court stated the adversary proceeding was a "core proceeding". No mention of any review by the District Court of any jurisdictional issues is made in the judgment of the District Court. The District Court stated the "United States Bankruptcy Court having heard and reviewed the evidence adduced at trial . . . the court having reviewed the matter together with the bankruptcy judges report and recommendations, and the Findings of Fact and Conclusions of Law having been duly signed, . . .", and endorsed the decision of Judge Seymour.

The District Court did not address itself to the requirement of litigant consent. The Bankruptcy Court had ordered Petitioners to file an adversary proceeding thereby denying the jury trial. The District Court totally ignored that, however, in adopting the Conclusions of Law and reached totally unsupported conclusions, holding; "*at no time* did the Bankruptcy Court order the plaintiff's to file an adversary proceeding in the Bankruptcy Court challenging the validity of the auction sale . . ." (emphasis added); but see, the order of Judge Seymour who in fact ordered "they (Petitioners) *shall* proceed by filing a proceeding under the adversary rules . . ."; and found further that "plaintiffs . . . have submitted to the jurisdiction of the Bankruptcy Court by filing their complaint . . ."; (Appendix B, this Petition) and Plaintiffs "have waived any right they may have had to object to the Bankruptcy Court's jurisdiction to hear this case."

The Ninth Circuit affirmed, erroneously relying upon *Katchen v. Landy*, 382 U.S. 323, 336-40 (1966).

The Ninth Circuit said;

> "Because bankruptcy proceedings are inherently proceedings in equity, the constitutional right to a jury trial, does not apply." (Appendix B, this Petition.)

While that decision is "not for publication," the Supreme Court, Petitioners submit, must grant certiorari here in order to right that unconstitutional exercise. *Ross v. Bernhard*, 396 U.S. 531,438 n.10, 90 S.Ct. 733, 24 L.Ed.2d 799 (1970).

The Seventh Amendment, Petitioners submit, preserves the right to jury trial in actions at law as it existed under the common law. It thus has no application to suits in equity or admiralty or to administrative

proceedings. *See* 5 *Moore's Federal Practice* ¶38.11[2] (2d ed. 1980). Hence, the primary determination which must be made is whether the cause of action sounds in law or equity. That bankruptcy courts act as courts of equity, *see, e.g., Barton v. Barbour,* 104 U.S. 126, 26 L.Ed. 672 (1881), is not dispositive of the matter, however, for the right to jury trial "depends on the nature of the issue to be tried rather than the character of the overall action." *Ross v. Bernhard, supra,* at 538. The Supreme Court has set forth three factors which may properly be considered in determining whether a particular claim or issue is legal or equitable: "first, the premerger custom with reference to such questions; second, the remedy sought; and third, the practical abilities and limitations of juries." Id. at n.10.

The District Court adopted the conclusion that "plaintiffs waived any rights they may have had to a jury trial." That was error, as a matter of law. It is clearly erroneous and is not supported in the record, as a matter of fact. The Circuit Court failed to differentiate the Article III rights involved here and the erroneous and baseless conclusion below that this was a "core proceeding," as hereinafter appears.

Judge Seymour's order dated March 18, 1983 states:

> " . . . Ordered that if the debtor's intend to proceed with the relief sought in their application they shall proceed by filing a proceeding under the adversary rules on or before March 23, 1983 . . . " (Appendix B, this Petition)

The plain and simple language mandated an adversary proceeding. The District Court took no note of that, or the record of objections to this proceeding on March 2, 1983, and at the trial, or, *the contradictory language of the Referral.*

The Emergency Rule (General Order 242-A) adopted in the District Court on December 27, 1982 provides at §(d) thereof:

"Powers of Bankruptcy Judges

(1) The bankruptcy judges may not conduct:

(D) Jury Trials"

The Bankruptcy Court made no pre-trial finding that the matters litigated in this adversary proceeding constituted a "core proceeding". After the trial, that was adopted by the District Court, in its judgment, but the basis for that conclusion is nowhere stated in the Findings of Fact and Conclusions of Law.

The only explanation for the error of both fact and law plainly apparent on this issue lies in the fact that the document was drawn by counsel for Tokai Bank and it was simply endorsed and rubber-stamped by Judge Seymour and by the District Court.

The plain language of the Order dated March 18, 1983 makes it clear that neither Judge Seymour nor Judge Real would have or could have thus agreed with counsel for Tokai unless they failed to consider that Order. Petitioners respectfully submit, neither could have ignored the literal meaning of the March 18 Order had they simply read it. There is no basis therefore for the Ninth Circuit thus ignoring Petitioners' Seventh Amendment rights.

Further, with regard to litigant consent and the exercise of judicial power, the Ninth Circuit, had by that time in September 1983, reviewed the power of those judicial bodies that give the appearance of functioning as an adjunct to an Article III Court. In *Pacemaker, supra,* the analogous position of litigants before special masters was focused upon, as follows:

> "No case squarely holds that litigant consent will solve the constitutional problems. In *Kimberly v. Arms*, 129 U.S. 512 (1889), the Supreme Court held that upon the consent of the parties a master could hear the matter and report findings of fact and law to the judge. Responsibility for the ultimate decision remained with the judge, and so "judicial" power was not vested in the master. To the same effect are the Coolidge (637 F.2d 132) and Raddatz (447 U.S. 667) cases, . . .[8] *Pacemaker, supra,* at p. 1311.

The Ninth Circuit had further addressed litigants' due process rights and their rights to judicial resolution by Article III Judges, in 1983, saying:

> "The use of Magistrates to conduct trials and enter final judgment implicates both due process and Article III concerns. We recognize that a due process right may be waived voluntarily, but there is more at stake here than the litigants due process right to a decision by an Article III Judge. We believe that the constitution establishes a framework of government that cannot be altered by statute nor waived by litigant consent. The independence of the judiciary, the distribution of power, and the separation of powers are at issue here.
> . . .

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[8]Please see Point III, this Petition, for a discussion of Judge Seymour's status on June 21, 1983 as a retired annuitant appointed as a Bankruptcy Judge by the District Court and after this trial, appointed as a Special Master, only, upon the withdrawal of his status as a "Bankruptcy Judge," by the District Court *because he was a retired annuitant.*

> The basis of the consent argument is that the right to an article III judge is a due process right, inuring to the benefit of litigants, and therefore waiveable like any other due process right. See footnote 10, *supra. Glidden Co. v. Zdanok*, 370 U.S. 530 (1962), refutes this contention . . . the Court indicated that *Article I Judges may not bind litigants in Article III Courts*, no matter how fairly they run the proceedings. The plurality specifically praised the qualifications, fairness, and impartiality of the judges involved. 370 U.S. at 533 (plurality opinion). Due process had been satisfied by the lower courts proceedings. If the right to an Article III Judge was only a due process right, the plurality would have terminated its discussion by noting the fair proceedings. See 370 U.S. at 533." *Pacemaker, supra,* at p. 1312. (emphasis added)

The Panel's analysis of the litigant's right to Article III adjudication was undisturbed by the Court *En Banc* and both the plurality and concurring opinions in *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 102 S.Ct. 2858 (1982) were relied upon, in that regard. (*Pacemaker, supra,* 725 F.2d 537, (1984).)

There is nothing in the case at hand that warrants or justifies other than even-handed treatment here. Petitioners are at a loss to explain why the unpublishable opinion below is so violative of the earlier recognition of constitutional guarantees bestowed in *Pacemaker, supra.*

Petitioners complained of their being deprived of their constitutional right to a trial by jury through the

decidedly unfair mechanism of ordering an adversary proceeding. They complained that the renovation of the Bankruptcy Court system, if it can be called that, pending curative legislation, denied access to Article III judicial powers because of the initiating order (March 18, 1983) of Judge Seymour.

This denial of Article III adjudication was reason for reversal, below, as a matter of law and Petitioners submit it is reason for granting certiorari.

POINT II

IT WAS ERROR FOR THE CIRCUIT TO ENDORSE THE BANKRUPTCY COURT ORDER THAT PETITIONERS FILE AN ADVERSARY PROCEEDING. THUS DEPRIVING PETITIONERS OF THE RIGHT TO TRIAL BY JURY WAS UNCONSTITUTIONAL.

In each of the post *Marathon* decisions reviewing both trial proceedings, the Emergency Rule, and those decisions upholding the jurisdiction of the Bankruptcy Appellant Panels, (before the stay in *Marathon* expired), it is clear the circuits uniformly agreed *Marathon* struck down the trial court jurisdiction of Bankruptcy Judges as conferred by 28 U.S.C. §1471(c). Those decisions uniformly found that where the District Court conducted a review and retained the essential attributes of judicial power, constitutionality was assured, and where the District Court *did not* conduct an actual review the essential attributes of judicial power were not retained, the exercise was unconstitutional for the reasons set forth in *Marathon*. *In re Burley*, 738 F.2d 981 at page 985 (1984).

> Significantly, *Burley* relied on the fact that "parties not in Bankruptcy Appellate Panel

districts receive review in the first instance by an Article III Judge, while those in Bankruptcy Appellate Panel districts do not." *Burley, supra,* at page 98.

It is clear therefore, that a rubber-stamp endorsement is not a review at all.[9]

The entry of the final judgment by Judge Real, without review, was an unconstitutional exercise as the Emergency Rule mandataed there be review of the proceedings of the Bankruptcy Court.

Assuming *arguendo,* there was power to preclude a jury trial and hear the issues to the court alone, the failure to conduct a review in the District Court constituted a failure to abide the attempted jurisdictional cure afforded by the Emergency Rule pending remedial legislation.

The Ninth Circuit decision does not address that, the citation to *Campbell, supra,* to the contrary notwithstanding. And, certiorari, Petitioners respectfully submit, should be granted here since the rule of *U.S. v. Raddatz*, 447 U.S. 667, 680, 683 (1980) was misunderstood below.

Raddatz, supra, requires an actual review not simply the affixing of a signature so as to give the appearance that "the district judge acted as the ultimate decision maker." Appendix A, this Petition.

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[9]Reading the Findings and Conclusions, only, does not constitute a review. *Carter, Danning, Joseph, etc. v. Lummis etc., et al.*, 12 B.C.D. 536 (C.D. Calif., 1984). If this was a "core" matter, a clearly erroneous standard "has been held fully consistent with Article III principles." *Carter, supra,* citing *In re Morrisey*, 717 F.2d 100, at p. 104 (3rd Cir. 1981); *1616 Reminic Ltd. Partnership v. Atchison & Keller*, 704 F.2d 1313 (4th Cir. 1983).

The decision of the Circuit Court *ignores* this Court's requirement as spelled out in *Raddatz*.

Whether this is a "core"matter or a "related proceeding" is of no moment, in so far as conducting a review is concerned, in view of the language of the Referral. Clearly, constitutionality turns upon the requirement that the District Court

> "subject the Magistrate's—(here, Judge Seymour's)—proposed findings and recommendations to *de novo* review before entering a final order. It was on the basis of this requirement that the Supreme Court found the authority and the responsibility to make an informed, final determination . . . remains with the judge", *United States v. Raddatz*, 447 U.S. 667, at 682, 100 S.Ct. at 2415 (1980).

On that basis, the Supreme Court found the Magistrates Act met Article III standards in *Raddatz*. The Ninth Circuit opinion cites *Raddatz*, here, but ignores its critical feature, i.e., that the Article III Court *conduct a de novo* review.

Once again, if the analogy to the Magistrates Act is to be upheld and the constitutional test thus applied is to pass scrutiny here, it is necessary that the District Court have made an informed, reasoned, final determination based upon the record before signing the judgment on September 16, 1983, the day following its submission by Judge Seymour. To thus reasonably conclude on the state of this record, and taking into consideration the volume of the Trial Court record, is, Petitioners submit, impossible. Furthermore, all of the exhibits were "lost" by the Bankruptcy Court at some time prior to the appeal, and, after Judge Real's endorsement of the Seymour action, stipulated copies

of the trial record had to be made available for the Circuit Court. The District Court may not or, more likely, probably did not have the record before it during the 24 hours or less prior to signing the judgment. The stipulation is a part of the Ninth Circuit record on appeal.

The Report, Recommendation and Certification for Review indicates the referral to the United States District Court is in accordance with Emergency Rule §(d)(3)(A) and (B).

The Report and Recommendation further asserts the adversary proceeding "is a core proceeding under §(d)(2) of the Emergency Rule", and most importantly states, but *because of the jurisdictional objections* "the circumstances relating to this adversary proceeding require that the judgment *should be entered* by a United States District Court judge." (emphasis added.)

Clearly, no further objections were necessary as suggested by the Ninth Circuit and hereinabove treated in the discussion of *Campbell, supra.*

Judge Real entered the judgment. He did not conduct a review. He was aware, if he read the Referral, before he signed the judgment, that there were substantial objections.

The foregoing provisions of §(d)(3)(A) and (B) are those that clearly mandate an Article III Court conduct a review of related proceedings.

The Emergency Rule states:

> "§(2)(A) a District Court *shall* review: . . . (III) a proposed order or judgment lodged under §(d)(3), whether or not any notice of appeal or application for leave to appeal has been filed." (emphasis added).

Presumably, the absence of a specific requirement that objections be filed does not vitiate the requirement that

the District Court conduct a *de novo* review, especially since no notice of appeal is required. The opinion below implies a contrary rule and Petitioners submit that is reason for granting certiorari, here where there are especially clear and repeated indications of objections and disputed legal conclusions and factual findings cited in the Referral.

Thereafter, the Rule grants discretion to the District Judge as to *method* and states:

> "(B) In *conducting review* the District Judge may hold a hearing and may receive such evidence as appropriate and may accept, reject or modify, in whole or in part, the order or judgment of the Bankruptcy Judge, and need give no deference to the findings of the Bankruptcy Judge. *At the conclusion of the review*, the District Judge *shall* enter an appropriate order for judgment." (emphasis added).

While there is discretion then as to the means of conducting the review, there is no discretion as to whether a review shall be conducted.

Here, there was no review conducted of the record between the submission of the proposed findings and conclusions on September 15 and the signing of the judgment on September 16, 1983.

If this matter, *arguendo*, was a "related proceeding" as suggested (and notably disputed) in the submission prepared by Tokai Bank for the Bankruptcy Judge, a *de novo* review was mandated in order to assure the constitutional exercise of power by an Article III Court—the District Court—and not the Bankruptcy Court. The perfunctory signing of the judgment did not constitute a *de novo* review sufficient to assure the exercise of

that power so jealously retained by the District Court for purposes of assuring the constitutionality of decisions reached in the Bankruptcy Court in "related proceedings".[10]

The District Court had been fully apprised here of the jurisdictional dispute. Nevertheless, the District Court failed to review that dispute. The Ninth Circuit has chosen to ignore that omission. The Findings, Conclusions and Judgment, therefore, *were not* the result of adjudication by an Article III Court. This cannot be construed to be "active supervision of (an) Article III Judge(s)", or the "Continued and vigilant supervision by (an) Article III Judge(s) . . . essential to the integrity of the system . . . " *Pacemaker, supra*, 725 F.2d 537, at p. 546. Accordingly, for this reason too, certiorari should be granted.

POINT III

SEATING A RETIRED ANNUITANT EXCEEDED THE POWERS OF THE DISTRICT COURT.

A. The Federal Rules Of Civil Procedure Do Not Empower The District Court To Appoint Retired Annuitants As Bankruptcy Judges Even In "Exceptional Circumstances".

Petitioners respectfully submit the Federal Rules are not constitutionally available to implement a system of bankruptcy courts and judges anymore than the Congress can confer Article III powers through the Magistrates Act.

The Congress has said the Federal Rules, prescribed by the Supreme Court, shall not "abridge, enlarge or

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[10]*Carter, supra; Pacemaker, supra*, 725 F.2d 537 (9th Cir. 1984); and, the Emergency Rule, *supra*.

modify any substantive right". (28 U.S.C. §2072). The Supreme Court was empowered to prescribe rules for the practice and procedure to be followed under Title 11, the Bankruptcy Act of 1978. Those rules too, "shall not abridge, enlarge, or modify any substantive rights". (28 U.S.C. §2075).

The Emergency Rule adopted by the Executive Committee of the Judicial Conference and implemented by order of the United States District Court (entered December 27, 1982), cannot serve to expand, limit or modify rights that have constitutional protection. Judicial supplementing of existing law, Petitioners submit, is appropriate only where it does not transgress upon the power of the Congress. Only the Congress has the power to enact appropriate remedial legislation, curing the unconstitutionality of the earlier grant of power to Bankruptcy Judges. Clearly, were it possible to cure the lack of subject matter jurisdiction by rule-making, there would have been absolutely no reason for this Court to stay its judgment in *Marathon*.

Although the Emergency Rule was arguably advanced as a "housekeeping" attempt pending remedial legislation, if it is not confined and scrupulously adhered to it in fact so substantially affects the rights of all persons (debtors and creditors alike) that it is equivalent to new legislation. That conclusion is inescapable in circumstances like those at hand where the resulting judicial body (retired Judge Seymour) takes it upon itself to exercise Article III powers over substantive rights. Pure and simple, that is the effect of Judge Seymour's order (March 18, 1983) entered at the urging of counsel for defendant Tokai;[11] and, the effect of the failure to review.

[11]The failure of Judge Real to conduct a review requires that conclusion, and, it further distinguishes the line of cases discussed in *Carter, supra*, where the constitutionality of the rule was upheld.

While in a proper case it might be argued that the failure of the Congress to act created procedural uncertainty on the one hand and removed available substantive remedies on the other, that was not the basis upon which the Bankruptcy Court ordered Petitioners file an adversary proceeding, without a jury. Tokai, cannot therefore be heard in these circumstances, to argue the need to cure procedural uncertainties and maintain and continue the bankruptcy court system.

That also appears to be the thrust of the Ninth Circuit language where it characterizes the issue on appeal as the constitutionality of *Marathon*. That simply is not the case.[12]

Tokai was successful in gaining the acquiescence of Judge Seymour in a conclusion of law that this was a "core proceeding". *That was purely an afterthought, and nothing more.* A cursory review of the Complaint by the District Court would have confirmed this was not a "core proceeding". It was a clear attempt at justification of the over-zealous pursuit below of a solution that would at once bestow credibility upon erroneous findings and conclusions of the Bankruptcy Court and justify having denied access to the judicial power of the United States, in an Article III Judge.

Prior to the Defendant inspired compulsion that an adversary proceeding was required under the bankruptcy rules without a jury, Petitioners argued there was sound

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[12]The within appeal involves the need for an adequate and demonstrable effort at review by the District Court. While the Supreme Court concluded in *Raddatz*, that taking testimony was not required in all cases it nevertheless maintained the rule that "review" meant conducting a review in order to reach an independent determination of the issues that required Article III adjudication. Judge Real did not do that and the Ninth Circuit opinion ignores that.

reason for the Bankruptcy Court to decide an Article III Court should hear the matter. The authorizing statute pursuant to which the Judicial Conference presumably acted mandating substantive rights not be "abridged, enlarged or modified" in enacting 28 U.S.C. §§2072 and 2075 was placed within Judge Seymour's focus and Petitioners argued the result reached in *Marathon, supra,* be regarded as a mandate requiring all substantive matters involving state created rights, or substantive rights that were provided by the Congress, be stayed pending the enactment of legislation, or an Article III Court was required. The specialized expertise necessary to the determination of bankruptcy matters—so-called "core proceedings"—could function in that environment without risk of violating the constitutional guarantees provided by Article III. Judge Seymour summarily rejected any consideration of those issues. Thereafter, Judge Real compounded the error with his utter disregard of the Rule.

Clearly, Judge Real regarded the Emergency Rule as an inspired attempt to continue the Bankruptcy Court system and he did so, as an Article I adjunct to the District Court in all matters regardless of whether the issues were purely core matters or matters of substantive rights requiring Article III adjudication. Counsel used the Referral procedure at will, recognizing (prior to 1984) that "review", as a practical matter, meant only "endorsement," at that time.[13] Clearly too, there was no consent and Petitioners' attempts to operate within the bankruptcy scheme evidence that, but, they also proved completely futile.

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[13]Prior to the enactment of the "Bankruptcy Amendments and Federal Judgeship Act" of 1984 P.L. 98-353, 98 stat. 333 (July 10, 1984).

Here, there were objections, there was no litigant consent and substantive rights were effectively foreclosed and without remedy. Thus abridging Petitioners' substantive rights, ordering an adversary proceeding, constituted an infringement upon Article III and fundamental rights to due process. It was in Tokai's interest to keep this matter in the Bankruptcy Court and not expose the continuing unconstitutional exercise and interference with Petitioners' substantive rights outside the Bankruptcy Court. There is no other reasonable explanation for the wording of the March 18, 1983, Court order.

Pacemaker, supra, denied bankruptcy judges any such aggrandisement of their power and re-affirmed *Marathon*.

Carter, supra, found the 1984 Act simply "codified" that Court's (Judge Takasugi) perception of review and the District Court's functioning under the Emergency Rule. The 1984 Act has been tested somewhat and it is surviving. The Circuit, Petitioners submit, should have viewed the way the system functioned in practice, however, as opposed to how it was designed to function in theory under the Emergency Rule on September 16, 1983 (the date of the Judgment appealed from.) *In this case, it was not in all respects constitutional because of how it failed to function.*

The courts below have denied Petitioners the exercise of their constitutional right to a jury trial. Their decisions have clearly "altered, abridged and modified" Petitioners' substantive rights to the real property, in these circumstances, in exercising Article III power. That is the effect of there having been no review here by the District Court as mandated by the Emergency Rule. Without review, the rubber-stamp procedure indulged

here makes the judgment appealed from a judgment of the Bankruptcy Court and not the District Court. For that reason, too, Petitioners submit, this Court should grant certiorari.

B. The Transition Statutes And The Emergency Rule Do Not Empower The District Court To Appoint Retired Referees As Bankruptcy Judges, Even In "Exceptional Circumstances".

The Emergency Rule provided for a general reference to the Bankruptcy Judges of the Central District ((C)(c)(1)) ("Reference to Bankruptcy Judges"). Those judges had been *appointed to office for 14 year terms by the President*, with the advice and consent of the Senate (28 U.S.C. §§152, 153(a)), and were subject to removal by the "Judicial Council of the Circuit" on account of incompetence, misconduct, neglect of duty or physical or mental disability" (28 U.S.C. §153(b)). In addition, the 1978 Act fixed their salaries making them subject to adjustment under the Federal Salary Act (28 U.S.C. §154).

Incumbent Bankruptcy Referees serving six year terms for compensation were designated to serve as Bankruptcy Judges until March 31, 1984 or until their successors took office (28 U.S.C. §404(b)). The District Court by Order dated November 12, 1982, appointed Judge Seymour, *a Retired Annuitant*, to serve as a Bankruptcy Judge.[14]

28 U.S.C. §452 entitled "Definitions", identifies those judges who are judges of the Courts of Appeals, District Courts, Court of International Trade "and any Court

[14]Judge Seymour was not an "Incumbent Bankruptcy Referee". And, there is no provision in the so-called transition statutes as set forth in the Act of 1978 at §404(b) (92 stat. 2683) for District Judges to appoint retired Referees to the bench.

created by act of Congress, the judges of which are entitled to hold office during good behavior." (28 U.S.C. §451). Judge Seymour had earlier retired from office as a Referee.

In the 1978 Act Congress intended original but not exclusive jurisdiction in the District Court in matters arising under Title II (28 U.S.C. §1471(b)). That jurisdiction was to be exercised by the newly created Bankruptcy Court and the judges of that Court serving without tenure. For those reasons, i.e., the unconstitutional exercise of Article III judicial power, the Supreme Court concluded in *Marathon, supra,* that 28 U.S.C. §1471 violated Article III. This Court further concluded that since Article III bars Congress from establishing under its Article I powers, legislative courts to exercise jurisdiction over all matters arising under the bankruptcy laws, the grant of jurisdiction could not be sustained as an exercise of Congress' power to create adjuncts to an Article III Court.[15] The Bankruptcy Court therefore functioned solely (at the time of the trial below) by virtue of the Emergency Rule.

It also must be concluded that the appointment by the District Court of a retired annuitant, a private citizen as it were, who did not have status as a judge of any

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[15] *Marathon* held §241(a) was non-severable and it struck the entire statute, leaving no remnant of power in either the Bankruptcy Court or the District Court. Petitioners respectfully submit without some remnant of power the District Court had no basis upon which to appoint the Retired Annuitant except as a Special Master under F.R.C.P. 53. Assuming *arguendo* that there is room to conclude §241(a) was severable, the mandatory reference called for in 28 U.S.C. §1471(c) is exclusive and prevents the exercise of power by the District Court under §§1471(a) and 1471(b). There is no room to conclude therefore, that the District Court had *any* authority in the case at hand to appoint a retired annuitant or refer cases to a retired annuitant who had no standing as a judge of a United States court.

court created by act of Congress, was improper. The District Court was neither empowered under the so-called transition statutes ((§404)(d)) or any other power including the power hereinabove discussed in the Emergency Rule to thus deal with the exceptional circumstances found to exist by virtue of the Supreme Court's decision in *Marathon.*

Uncomfortable as thus concluding may be, the fact remains there was no authority pursuant to which the District Court could designate Judge Seymour to sit.

If it is argued that thus striking the power of Judge Seymour to sit may cause hardship in cases earlier decided by the retired annuitant, Petitioners respectfully request this court deal with the matter *prospectively*, assigning the same rationale utilized by the Court in *Marathon, supra.*

Further, with regard to whether the Emergency Rule gave power to appoint a Judge, Petitioners respectfully request this Court consider its stay of judgment in *Marathon* and the reasons for that stay. Clearly, if the unconstitutionality of the jurisdictional grant in §1471 could be papered over by Rule of Court there would not have been a need for a stay. The stay was deemed necessary to "afford Congress an opportunity to reconstitute the Bankruptcy Courts or to adopt other valid means of adjudication without impairing the interim administration of the bankruptcy laws" *Marathon, supra.* Indeed, had it been possible for the Supreme Court with its rule making power to confer the power that was absent for want of jurisdiction, Petitioners respectfully submit, this Court need not have waited for the District Courts to enact an Emergency Rule. Absent, curative and remedial legislation then, the bankruptcy system was placed in a jurisdictional void on June 28, 1982 and that void was not filled by the

Emergency Rule of December 27, 1982, not sufficiently at least to justify *each* of the unconstitutional exercises hereinabove argued.

The bankruptcy system continued while Congress continued to consider remedial legislation. During the congressional exercise, disagreement over the status of Bankruptcy Judges and the nature of the power that was to be conferred upon them, increased. The House Judiciary Committee reported its conclusions, (significantly, in early 1983), that an Article III Bankruptcy Court was needed. (H.R. 3, 98th Congress, Rep. No. 9, Pt. 1, 1st sess. (1983)). Later the Senate Judiciary Committee reported a bill establishing non-Article III Bankruptcy Judgeships to "assist the District Courts" which would "retain" bankruptcy authority (S. 1013, 98 Congress; see S. Rep. No. 55, 98 Congress, 1st sess. (1983)). That report concluded as the Supreme Court had concluded in *Marathon* that the jurisdictional grant to the United States District Court was to be exercised exclusively by the Bankruptcy Court, which was a "non-adjunct" Court, a "non-legislative" Court and a "non-Article III" Court.

Neither report addressed the fact that the *1983* jurisdiction of the Bankruptcy Courts was derived from the Emergency Rule and the District Court did not have the power to legislate. Nor were the inconsistencies between the Emergency Rule and the Bankruptcy Rules (as promulgated by the Supreme Court on August 1, 1983) addressed.

Shortly prior to the termination of the transition period, the House agreed with the Senate position and Bankruptcy Judges[16] were made "adjuncts" of the District Court. (See, H.R. 5174, 98 Cong., 2nd Sess.

[16]Appointed in accordance with 28 U.S.C. §§152 and 153(a).

with S. 1013, 98 Cong., 2nd Sess.) Thereafter an interim measure amending the 1978 Act extended the transition period for appointed Judges to April 30, 1984 (B.L. No. 98-249, 98 stat. 116 (March 31, 1984)). Another extension of the transition period to May 25, 1984 (P.L. No. 98-271, 98 Stat. 163 (April 30, 1984)) and a series of additional extensions of the transition period were then enacted prior to the agreement by both houses to the conference report in June of 1984.

The "Bankruptcy Amendments and Federal Judgeship Act of 1984," was the result. (P.L. No. 98-353, 98 Stat. 333, July 10, 1984.)

The 1984 Act resolved the transitioning of Bankruptcy Judges. It must be noted that the terms of the *judges then sitting by appointment* (28 U.S.C. §152), continued by operation of the holdover provisions in §§404(b) and (d) of the Bankruptcy Act of 1978.

The *retired annuitant sitting below was appointed by District Court Order outside the operation of the transition provisions and without benefit of being a retained Bankruptcy Judge in office after the expiration of a stated term or until a successor took office.*

The District Court had no power to thus act. The Ninth Circuit opinion erroneously relies upon 404(d) of the 1978 Act and 40 (d)(2) of the Act of 1898.

The Retired Annuitant was not a "sitting judge" within the meaning of the transition statutes. His earlier right to hold over as a referee had long since expired. There was no authority to appoint judges conferred upon the District Court by the 1978 Act and that authority is not inherent in the District Courts of the United States, in any case. It can not be said the need to avoid disruption of the bankruptcy system served to confer the power to appoint Judges. That is why the transition statute

and the holdover provisions were *critical to who was permitted to sit* during the period June 28, 1982 through July 10, 1984.[17] The Ninth Circuit opinion ignores that.

Finally, his appointment was clearly in violation of the "Appointments Clause" (Article II, section 2, clause 2 of the Constitution). Being neither a then sitting Bankruptcy Judge appointed under 28 U.S.C. §152, or an incumbent Referee, there was no constitutional authority for his holding-over and there was no constitutional authority for his appointment.

SUMMARY OF ARGUMENT

Certiorari should be granted. The memorandum decision of the Ninth Circuit does not accord with the law.

The District Court exceeded its authority in appointing a retired annuitant as a Bankruptcy Judge. There was no authority for that appointment in either the transition statutes, the holdover provisions, the Federal Rules of Civil Procedure or, by virtue of any provision of the Constitution of the United States.

The Bankruptcy Court deprived Petitioners of their constitutional right to a jury trial when it ordered them to proceed in the Bankruptcy Court and file an adversary proceeding.

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[17]Had Judge Seymour been other than a retired annuitant, arguably, Article II, section 2, clause 2 of the Constitution might have colored the authority of the District Court to extend a sitting Bankruptcy Judge by virtue of the constitutional grant to the Congress of authority to vest appointment to inferior offices, as applicable, in the court of law. *Myers v. United States*, 272 U.S. 52, 128 (1926). But, Article II, section 2, clause 2 and 28 U.S.C. §152 cannot be circumvented by a District Court appointment. The Ninth Circuit opinion ignores that.

Following the conclusion of the trial the Bankruptcy Court made Findings of Fact that were clearly erroneous in material particulars and Conclusions of Law that were in error, as a matter of law and referred them to the District Court.

The Referral was pursuant to the Emergency Rule.

Upon receipt of the referral, Judge Real failed to conduct a *de novo* review in accordance with the Emergency Rule and simply rubber-stamped the decision of Judge Seymour. The documents referred were signed by Judge Seymour on September 15, 1983 and Judge Real signed the judgment on September 16, 1983.

CONCLUSION

For the foregoing reasons Petitioners respectfully submit their petition for a Writ of Certiorari should be granted.

DATED: February 13, 1986

Respectfully submitted,

LAWRENCE J. GALARDI
Attorney for Petitioners

APPENDIX

APPENDIX A

FILED

Not For Publication

DEC 17 1985

CLERK, U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: LAWRENCE J. GALARDI, dba LAWRENCE J. GALARDI, a professional corporation, and SHARI J. GALARDI, Debtors.	No. 83-6385 Bkcy. Adv. No. LA 83-4052 RS MEMORANDUM
LAWRENCE J. GALARDI and SHARI J. GALARDI, Plaintiffs-Appellants, -vs- TOKAI BANK OF CALIFORNIA, a California corporation; DAVID A. GILL, Trustee in Bankruptcy for GALARDI, Defendants-Appellees.	

Appeal from the United States District Court
for the Central District of California
Manuel L. Real, District Judge, Presiding
Argued and Submitted November 4, 1985
Los Angeles, California

Before: WALLACE, HUG, and HALL,
Circuit Judges.

Lawrence and Shari Galardi (the Galardis) brought an adversary action in the bankruptcy court in order to set aside the auction sale of property pursuant to their prior chapter 7 liquidation proceeding. The bankruptcy judge made findings of fact, conclusions of law, and a proposed judgment, and referred the matter to the district court. The district court entered a judgment dismissing the action, and the Galardis appealed. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

The Galardis' first four arguments involve questions of law, which we review de novo. *United States v. McConney*, 728 F.2d 1195, 1201 (9th Cir.) (en banc), *cert. denied*, 105 S. Ct. 101 (1984).

The Galardis argue first that the exercise of jurisdiction by the bankruptcy court was unconstitutional under *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (*Marathon*). We disagree. The bankruptcy court acted pursuant to General Order No. 242-A of the United States District Court for the Central District of California. General Order No. 242-A complies with the requirements of article III and the holding of *Marathon*. *See Lucas v. Thomas (In re Thomas)*, 765 F.2d 926, 928-30 (9th Cir. 1985).

The Galardis also argue that they were deprived of their constitutional right to a jury trial. This argument is equally without merit. Because bankruptcy proceedings are inherently proceedings in equity, the constitutional right to a jury trial does not apply. *Katchen v. Landy*, 382 U.S. 323, 336-40 (1966).

Next, the Galardis argue that the district court's adoption of the bankruptcy judge's proposed judgment

violated the requirements of article III and due process. The Galardis contend that the district judge was required to review the entire record before entering judgment. We reject this argument. Because the Galardis did not make any objections to the bankruptcy judge's findings of fact or conclusions of law, the district judge properly made his determination on the basis of these findings and conclusions. *See Campbell v. United States District Court,* 501 F.2d 196, 206 (9th Cir.), *cert. denied,* 419 U.S. 879 (1974). Because the district judge acted as the ultimate decisionmaker, there has been no violation of the requirements of article III or of due process. *United States v. Raddatz,* 447 U.S. 667, 680, 683 (1980).

The Galardis also argue that the district court improperly appointed a retired bankruptcy referee to serve as bankruptcy judge. This argument is unsound. The district court's appointment of the bankruptcy judge was authorized by section 404(d) of the Bankruptcy Reform Act of 1978, which expressly reserved the authority, under section 40d(2) of the Bankruptcy Act of 1898, to appoint a retired referee to perform bankruptcy duties.

The Galardis also challenge several of the bankruptcy judge's evidentiary rulings. We review these rulings for abuse of discretion. *M.A.P. Oil Co. v. Texaco Inc.,* 691 F.2d 1303, 1310 (9th Cir. 1982). We see no merit in any of the Galardis' evidentiary contentions.

AFFIRMED.

Note: This disposition is not appropriate for publication and may not be cited to or by the Courts of this Circuit except as provided by Ninth Circuit Rule 21.

APPENDIX B

...ENTERED

... 1983

...K, U.S. BANKRUPTCY COURT
... DISTRICT OF CALIF...

FILED

MAR 18 1983

CLERK, U.S. BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIF...

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MAR ... 1983

... U.S. BANKRUPTCY COURT
... DISTRICT OF CALIF...

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA

In re:)	
LAWRENCE J. GALARDI dba)	Bankruptcy No.
LAWRENCE J. GALARDI,)	LA 81-00606-RS
a Professional Corporation,)	ORDER DISMISSING
and SHARI J. GALARDI,)	APPLICATION
Debtors.)	

On March 2, 1983, the debtors' application for order: (A) declaring this Court does not have jurisdiction; (B) declaring the auction of December 12, 1982 was illegal and a nullity; (C) setting aside any grant deed resulting from the auction of December 12, 1982; (D) compelling a trustee to execute a grant deed as to the eight (8) acre parcel known as 20600 Eagle Pass to the successful

bidder came on regularly for hearing before Judge Russell B. Seymour, bankruptcy judge presiding. Lawrence J. Galardi appeared in propria personna and John A. Graham of Frandzel & Share, A Law Corporation, appeared on behalf of Tokai Bank of California.

Having considered the written application and papers in support thereof, the memorandum of points and authorities in opposition to the debtors' application, and after considering all arguments, the Court finds that the relief being sought in the debtors' application should be requested in the context of an adversary proceeding to be governed by the rules applicable to adversary proceedings. Therefore, based on the foregoing findings, and good cause appearing therefore, it is

ORDERED that the pending application is hereby dismissed and it is further

ORDERED that if the debtors intend to proceed with the relief sought in their application they shall proceed by filing a proceeding under the adversary rules on or before March 23, 1983; and it is further

ORDERED that upon the commencement of said adversary proceeding, a summons and notice of trial shall be issued and served in accordance with Bankruptcy Rule 704.

Dated: March 18, 1983.

Russell B. Seymour

RUSSELL B. SEYMOUR
Bankruptcy Judge

APPENDIX C

EXCERPT FROM PLAINTIFFS' TRIAL BRIEF RE: ISSUES FRAMED BY THE COMPLAINT

The first cause of action seeks declaratory relief, declaring the Court is without jurisdiction of the subject matter and notwithstanding the direction that the within adversary proceeding be filed by plaintiffs, if plaintiffs were to seek the relief herein prayed for. The first cause of action, in sum, prays for judgment declaring this Court is without Article III judicial power to rule on the matters here in issue and cannot otherwise legally exercise Article III powers.

The issues of this Court's jurisdiction and this Court's lack of Article III powers and lack of jurisdiction of the subject matter are hereby expressly reserved. The Court has in other proceedings declared it believes it can lawfully exercise the powers in question and although plaintiffs do not accede, thereto, they recognize they are required to go forward here and do so on the basis of the aforesaid reservation of rights with regard to the jurisdictional issues.

The second cause of action seeks declaratory relief, declaring the auction of December 12, 1982 was illegal and was nullity:

(a) for failure to comply with the Court Order dated November 24, 1982;

(b) for failure to advertise properly;

(c) for misleading and misrepresenting material and substantial facts, prior to and at the time of the auction on December 12, 1982;

(d) for failing to conduct the action in accordance with reasonable auction practices;

(e) for fraud and unfairness resulting in depriving the bidding public, the debtors and the estate of

debtors of their rights to a fair and legal auction and judicial sale;

(f) for failing to provide for the full fair and free exchange of information prior to and at the time of the auction and thereby creating and fostering confusion, ambiguities, false information and otherwise interferring with a public auction in accordance with law;

(g) for failing to lawfully conclude the bidding on the 29 acre parcel;

(h) for explicit misrepresentations with regard to the properties auctioned;

(i) for discouraging the bidding public from bidding, to the disadvantage to the estate, the creditors and debtors with the express purpose of serving the advantage of Defendant, TOKAI BANK, only;

(j) for the misfeasance and malfeasance of the representative of the attorney for the Trustee;

(k) for defense counsel interference with the conduct of the auction;

(l) for the erroneous statements of law made by the auctioneer;

(m) for making last minute changes in auction terms that were not earlier advertised or reasonably known to the bidding public; and

(n) for conducting an auction that was unfair and fraudulent and did not accord a fair public auction to the bidding public or to the complainants, to the prejudice of debtors estate and in flagrant disregard of this Court's Order and the rights, duties and obligations of counsel as officers of this Court.

The third cause of action seeks declaratory relief declaring defendants' action violated the Stay provided by the Congress in 11 U.S.C. §362, et seq.

The fourth cause of action seeks a temporary injunction restraining defendants from attempting to obtain possession of either or both properties or otherwise disposing of or seeking to liquidate said properties prior to determination of the rights of the parties here in issue. (83-4052; Docket Entry #24)

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on February 13, 1986, I served the within *Petition for Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
One First Street, N.W.
Washington, D.C. 20543
(Original and forty copies)

Frandzel & Share
8383 Wilshire Boulevard
Suite 400
Beverly Hills, California 90211

Robinson, Wolas & Diamant
1888 Century Park East
Suite 900
Los Angeles, California 90067

I declare under penalty of perjury that the foregoing is true and correct. Executed on February 13, 1986, at Los Angeles, California.

Joy Rivelli Miller
(Original signed)